34

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 1141

JAMES R. HILL, A MINOR, BY THEODORE A. HILL, HIS FATHER AND NEXT FRIEND,

Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

ROYAL W. IRWIN,
Attorney for Petitioner.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Petition for writ of certiorari	1-5
Statement of matters involved	1
Basis of jurisdiction	3
Questions presented	3
Reasons for allowance of writ	5
Prayer	5
Brief in support of petition	7

Cases Cited.

Bailey v. Central Vermont R. R. Co., 319 U. S. 350	16
Bremer v. L. E. & W. R. R. Co., 318 Ill. 11	10
Bermier v. I. C. R. R. Co., 296 Ill. 464	8
C. B. & Q. R. R. Co. v. Murowski, 179 Ill. 77	9
C. & A. R. R. Co. v. O'Neil, 172 Ill. 527	9
Gibson v. Leonard, 143 Ill. 182	14
Hughes v. Medendorf, 294 Ill. App. 424	16
I. C. R. R. Co. v. O'Connor, 189 Ill. 559	8
McDaniel v. Terminal R. R. Co., 302 Ill. App. 332	14
Moore v. Ohio Oil Co., R. R. Co., 241 Ill. App. 388	15
Pittsburgh & Ft. W. & C. R. R. Co. v. Callaghan, 157 Ill. 406	9
Ryan v. C. & N. W. R. R. Co., 315 Ill. App. 65	15

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vs.

BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The petition of James R. Hill, a minor by Theodore A. Hill, his father and next Friend, respectfully shows:

(1) Statement of the Matter Involved.

The petitioner (plaintiff below) brought an action against the respondent (defendant below) for damages in the United States District Court for the Northern District of Illinois, Eastern Division.

The Complaint alleged that the respondent, a railroad

company, had a right of way in which it caused locomotives and cars to be moved over certain tracks adjacent to the Allied Mills, Inc. in Christian County, Illinois; that on the premises of the Allied Mills, Inc. and close to the right of way of the railroad company was a certain gateway and leading from said gateway was a flight of stairs and that for a long time prior to the accident, people frequently passed over the premises of the Allied Mills, Inc. through said gateway and over said stairs onto and across the right of way of the respondent railroad company adjacent to said premises.

It was further alleged that the petitioner, 11 years of age, had, prior to said occurrence for a long time proceeded through the premises of the Allied Mills, Inc. to and across the right of way of the respondent, of all of which in the exercise of ordinary care on its behalf, the respondent would have notice; that petitioner on the day of the accident proceeded across the tracks of the respondent and when he was between two standing box cars, the respondent caused one of said box cars to be moved against the other and thereby petitioner was crushed between the couplers. The negligence charged was: (a) Respondent negligently caused, permitted and allowed said box car to violently strike against the petitioner; (b) Respondent wilfully and wantonly caused, permitted and allowed said box car to violently strike against the petitioner; (c) Respondent negligently failed to keep a proper lookout for persons crossing said tracks; (d) Respondent negligently failed to give suitable, sufficient and proper notice, signal and warning that the box car was about to be moved.

Respondent's answer did not deny that it caused one of said box cars to be moved against the other box car, thereby crushing the petitioner between the couplers, but it did deny that it was guilty of any of the negligence charged against it. (Tr. 5.)

There was much evidence that for at least six months prior to the accident, the petitioner and a considerable number of the public passed through the property of the Allied Mills, Inc. and over the rails of the respondent at the place where the accident occurred.

The trial court directed a verdict for the respondent without indicating the ground upon which it acted. (Tr. 61.)

From this judgment, petitioner appealed to the Circuit Court of Appeals for the 7th Circuit. The Circuit Court of Appeals affirmed the District Court on the ground that in the situation here appearing, it did not believe the respondent could have been expected to anticipate the petitioner's presence on the tracks between the cars, and that there was not sufficient evidence of a wilful and wanton injury to make a jury issue. (Tr. 86.)

(2) Basis of Jurisdiction of This Court.

(a) Federal jurisdiction is based upon the diversity of citizenship between the petitioner and the respondent.

(b) The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 30, 1946 and reported in 153 Fed. (2) 91.

(3) Questions Presented.

The judgment of the Circuit Court of Appeals sought to be reviewed affirmed a judgment of the District Court holding that the petitioner had not made out a prima facie case sufficient to go to the jury.

The Complaint charged respondent with wilful and wanton conduct and with negligence.

The Courts of Illinois hold that where a railroad company permits the public to use portions of its right of way

as a passageway, it must exercise some care to avoid injuring those whom it has reason to know may be upon its premises in the exercise of such privilege, and if there is any evidence in the record fairly tending to show such a gross want of care as indicates a wilful disregard of consequences, or a willingness to inflict injury, then it is a question to be determined by the jury whether the negligent conduct amounted to wantonness and wilfulness.

The Circuit Court of Appeals held to a rule long discarded by the Courts of Illinois that a railroad company is under no duty to exercise active vigilance to provide against injury to a trespasser on its tracks unless his presence is known. (Tr. 84.)

The rule is also firmly established as the law of Illinois that when a railroad company has knowingly permitted licensees to use a well-defined path or roadway across its premises for some considerable time, it should not by any affirmative act on its part injure such licensee.

The Circuit Court of Appeals in avoiding the application of those principles to this case said: "In the situation here appearing, we do not believe the defendant could have been expected to anticipate the plaintiff's presence on the tracks between the cars." (Tr. 86.)

Inasmuch as the Circuit Court of Appeals earlier in its opinion stated: "It is undisputed that for at least six months prior to the accident, persons passed both ways through the property of the Allied Mills and over the defendant's rail (Tr. 83), it seems inconsistent to say that there is no evidence from which the respondent could have been expected to anticipate the petitioner's presence on the tracks. (Tr. 86.)

(4) Reasons for the Allowance of the Writ.

The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

The rule in Illinois is now clearly established that the fact of general use by the public of a way so as to create a probability of their presence might make an act which would otherwise be merely negligent so reckless as to indicate a disregard for life or a general disposition to do injury.

The rule is also established in Illinois that it is the duty of a railroad company to refrain from active negligence which may result in injury to a licensee whom the railroad company, has reason to believe is upon the premises.

It is submitted that these reasons call for the exercise of this Court's power of review.

Wherefore, the petitioner respectfully prays: That a Writ of Certiorari be issued out of and under the seal of this Court commanding the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this Court for its review and determination on a day certain named therein a complete transcript of the record in the case numbered and entitled on its docket as No. 8880, James R. Hill, a minor, by Theodore A. Hill, his Father and Next Friend, Plaintiff-Appellant *vs.* Baltimore & Ohio Railroad Company, a corporation, Defendant-Appellee; that the judgment of the Circuit Court of Appeals may be reversed by this Court; and that your petitioner may have such other and further relief as seems just.

JAMES R. HILL, a minor by Theodore A. Hill, his Father and Next Friend,
Petitioner,

By ROYAL W. IRWIN,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. .....

JAMES R. HILL, A MINOR, BY THEODORE A. HILL, HIS FATHER AND NEXT FRIEND,

Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ARGUMENT.

The opinion of the Circuit Court of Appeals (Tr. 81) is reported as James R. Hill, a minor by Theodore A. Hill, his Father and Next Friend *vs.* The Baltimore and Ohio Railroad Company a corporation in 153 F. (2d) 91.

The District Court has wrongfully deprived the petitioner of his right to trial by jury. There was sufficient evidence upon which the case should have been submitted

to the jury's consideration. The trial judge failed to state his reasons for directing a verdict.

The Circuit Court of Appeals bases its opinion principally on *Illinois Central Railroad Co.* v. *O'Connor*, 189 Ill. 559. It is true that the earlier cases held that a railroad company owed no duty as to a trespasser or licensee except to refrain from wilfully and wantonly injuring him. The cases even went so far as to hold that if an engineer saw a trespasser or licensee upon the tracks, he had a right to assume that the trespasser or licensee would see the approach of his train and leave the tracks in time to avoid being injured.

Since the turn of the century a more humane doctrine has been adopted. The law is well settled in Illinois at the present time that when a railroad company permits the public to use portions of its right of way as a passageway, it must exercise some care to avoid injuring those whom it has reason to know may be upon its premises in the exercise of such privilege.

In the case of *Bernier* v. *Illinois Central Railroad Co.* 296 Ill. 464, it appears that for many years, people travelled on foot between parts of the city of Kankakee east and west of the railroad at a place where the street if extended across the railroad track would have been most convenient. The deceased at the time of the accident, started across the tracks on the path and stood close to the east rail of a track on which a freight train was approaching. Under the Court's instruction, the right of recovery was limited to the count charging wilful and wanton injury. The Court said:

> "Where a railroad company has permitted the public to travel over its tracks for a considerable period of time and a considerable number of people have availed themselves of such use, the railroad company must keep a lookout for persons on its track." (p. 471.)

In *C. B. & Q. R. R. Co.* v. *Murowski*, 179 Ill. 77, it appeared that a large number of people crossed the railroad tracks and entered the gate of a factory in going to work. Men in search of employment were accustomed to congregate on the tracks and right of way in front of the gate. On the morning of the injury, the plaintiff had gone there with others for the purpose of getting employment when he was struck by a passing engine. The Court said:

> "Under the facts as they appeared from the evidence it was a question for the jury to determine whether plaintiff was a trespasser or whether he was rightfully on defendant's property at the time he was injured." (p. 82.)

In *Chicago & Alton RR Co.* v. *O'Neil*, 172 Ill. 527, it appeared that a great many people employed in the various establishments about the railroad tracks passed back and forth over the tracks in going to and returning from their employments. (p. 529.) The Court said:

> "The jury could not, from the evidence, believe otherwise than that the place was used by hundreds of pedestrians, and that the engineer knew when he 'kicked' the car down the track without any brakeman or light upon it, that 'swarms' of people were then passing over the tracks in every direction. * * * we are not prepared to say that there was no evidence upon which the jury could base a finding that it was a 'public place open to the public.'" (p. 532.)

In *Pittsburgh, Fort Wayne and Chicago Railway Co.* v. *Callaghan*, 157 Ill. 406, where it appeared that many persons employed in neighboring manufacturing establishments, used a strip of ground occupied by the tracks as a common passageway, the plaintiff attempted to cross the railroad near the west end of two cars standing on the tracks. A flying switch was made and two cars were thrown

against stationary cars causing them to be moved against the plaintiff. The Court said:

> "It appears that for at least three years before the accident it had been used as a passageway and crossing by hundreds of people daily. It was on a curve, where the view of those operating the trains and those seeking to pass over was obstructed. Under such circumstances as this it was the duty of those having control of trains to use care commensurate with the danger."

It thus must be considered as the law of Illinois that where a railroad company has permitted for a long time the public at large to cross over its tracks at a particular place, the railroad company may not with impunity cause injury to such persons. They are charged with knowledge of the presence of such persons and are bound to exercise some care for their safety.

The leading case in Illinois is *Bremer* v. *L. E. & W. RR Co.* 318 Ill. 11. There the deceased, even without the knowledge of the trainmen, was riding in a caboose attached to a freight train. It was charged that the operator of the train was guilty of wilful and wanton conduct which resulted in injury to a person whose presence on the train was not known.

The Circuit Court of Appeals in its opinion was not able to state any valid reason why the principles in this case were not applicable. (Tr. 85.) The Court in the Bernier case said:

> " 'The fact of general use by the public of a track, so as to create a probability of their presence, might make an act which would otherwise be merely negligent so reckless as to indicate a disregard for life or a general disposition to do injury.' * * *
>
> "If there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to

inflict injury, then it is a question to be determined by the jury whether the negligent conduct of the defendant amounted to wantonness or willfulness (*Walldren Express Co.* v. *Krug*, 291 Ill. 472). What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement. The gross negligence which will justify the presumption of willfulness or wantonness is such as to imply a disregard of consequences or a willingness to inflict injury (*Lake Shore and Michigan Southern Railway Co.* v. *Bodemer, supra*). An intentional disregard of a known duty necessary to the safety of the person, and an entire absence of care for the life, the person or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness such as charges the person whose duty it was to exercise care with the consequences of a willful injury." (p. 17, 18, 20-21.)

The Circuit Court of Appeals seeks to avoid the effect of the cases cited by petitioner with this statement: "It was never established that the defendant was aware of plaintiff's presence on the tracks." (Tr. 85.) That is inconsistent with a former statement wherein the Court said: "It is undisputed that for at least six months prior to the accident, persons passed both ways through the property of the Allied Mills and over the defendant's rails." (Tr. 83.)

We will refer briefly to the evidence showing the use of the way by the public.

Francis Hanauer testified that for a period of at least six months, people wanting to go to the creamery would go through the gate and across the railroad tracks on the beaten path. (Tr. 19.) When one comes down the steps, there is no place he can go except onto the railroad tracks.

They then would go up over the path that goes to the bank west of the crib (Tr. 20.) There were two paths, one west of the loading room and one on the right. The one to the west was north of the railroad track. In order to get to the railroad track, you would have to walk north through the gate (Tr. 22).

Roy Sellers employed at the Allied Mills for 13¼ years, testified he would see people come down the steps onto the railroad tracks. They could go west down the railroad track, go north over the vacant lot, or east down the railroad track. There was a creamery one-half a block south and they carried milk through there at times. (Tr. 31.)

William Tackett lived north of the mill. He testified that he crossed through there two or three times a day in going to the creamery. He had seen people go through the gate quite often going and coming (Tr. 34).

Jerry May, the boy who often went through the Allied Mills with the plaintiff, testified he had been in the habit of going with the plaintiff on his paper route three or four nights a week for a year and a half before the accident. He said that he went across the property of the Allied Mills onto the railroad tracks and that he had seen lots of boys do the same thing. (Tr. 54.)

In view of the testimony of these witnesses, it must be conceded that it was a question of fact for the jury whether the respondent was charged with notice of persons who had been in the habit of crossing over the railroad track at the particular place.

In view of this evidence, the Circuit Court of Appeals was not warranted in saying that it was never established that the respondent was aware of the petitioner's presence on the tracks (Tr. 85). Neither was the Court warranted in saying that it did not believe that the respondent could have been expected to anticipate the petitioner's

presence on the tracks between the cars. (Tr. 86.) There was ample evidence in the record from which the jury might have found that the respondent was charged with notice that the petitioner or some employee of the Allied Mills, or one of the public, might be on the pathway.

It was charged that while the petitioner was proceeding over said tracks, the respondent caused one of said box cars to be moved and propelled to and against the other standing box car and thereby the petitioner was crushed between the couplers of the said box cars (Tr. 4). The respondent in its answer did not deny these allegations (Tr. 5). It must be assumed as true that the respondent caused the box cars to be moved together. The petitioner testified that he saw no trainman there and that no signal or warning was given to him. (Tr. 43.) The respondent was charged with knowledge that the petitioner, employees of the Allied Mills, and the public in general were accustomed to use the pathway through the gate and across the tracks. An intentional disregard of a known duty necessary to the safety of the person and an entire absence of care for the life and persons of others, such as exhibits a conscious indifference to consequences, makes a case of constructive wilfulness. It was a question of fact for the jury to determine whether the negligent conduct of the respondent amounted to wantonness and wilfulness.

Liability to Licensee for Injury Caused by Affirmative Negligence.

It was also charged in the Complaint that the respondent was negligent.

The rule that an owner of premises may be held liable for active negligence to a licensee is firmly embedded in the laws of Illinois. An owner of property who permits

licensees to come upon his premises ought not to escape liability for damages caused by affirmative acts of negligence on his part. If, for instance, one comes upon the premises of a filling station by permission of the owner, it would not seem reasonable to require the owner to render the place physically more safe for the licensee, but the licensee being rightfully upon the owner's premises with his permission, it would seem wrong that the owner should be permitted to carelessly back his automobile against the licensee without being liable.

The rule was first stated by the Supreme Court of Illinois in *Gibson* v. *Leonard,* 143 Ill. 182, 192:

> "* * * the general rule is, that the licensor assumes no duty to the licensee, except the duty to refrain from affirmative or willful acts that work an injury."

The act of respondent in causing cars to be moved against the petitioner and in failing to give proper warning was active as distinguished from passive negligence and under the decisions of Illinois Courts, the matter ought to have been submitted to the jury.

In *McDaniels* v. *Terminal Railroad Ass'n,* 302 Ill. App. 332 (Petition for leave to appeal to Supreme Court denied) the plaintiff's action was based upon personal injuries sustained as a result of being struck by a girder which was thrown from defendant's overhead bridge by its employees. It appeared from the evidence that there was a well-worn pathway along the tracks that passed under the viaduct which was maintained by the defendant. Witnesses testified that the pathway had been there for many years and had been in daily use by members of the public. The defendant maintained that the plaintiff was a trespasser to whom it owed no duty other than not to wilfully and wantonly injure him. The Court held that

the railroad and trespasser cases referred to by the defendant are not applicable under the facts and circumstances shown. The Court said:

> "The defendant company, as shown by the testimony of its employee, knew of the fact that such pathway was used by the general public and under all such circumstances, defendant owed a duty to the plaintiff to watch out for him and for members of the public who might be using such pathway, before throwing objects onto such pathway." (p. 345)

In *Ryan* v. *C. & N. W. Ry. Co.*, 315 Ill. App. 65, the Court in quoting from Prosser on Torts, said:

> "Some courts have gone so far as to say that there is no duty to a licensee other than to refrain from inflicting wilful and wanton injury upon him. As in the case of trespassers, however, an increasing regard for human safety has led to a retreat from this position. It is now generally held as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the protection of a licensee." (75-76)

In *Moore* v. *The Ohio Oil Company*, 241 Ill. App. 388, the Court said:

> "The view founded in natural justice, which has the approval of many courts, is that when a landowner has knowingly permitted licensees to use a well defined path or roadway across his premises for some time he should not by any affirmative act make the roadway more dangerous for such licensees without giving them notice of the changed conditions, and if he fails to give notice of the fact that he has made the way more dangerous he will be held to respond in damages for the resulting injury. 20 A.L.R. 202, note; *Corby* v. *Hill*, 4 C.B.N.S. 556; *Morrison* v. *Carpenter*, 179 Mich. 207, 146 N. W. 106; *Sage's Adm'r* v. *Creech Coal Co.*, 194 Ky. 415, 240 S. W. 42; *John* v. *Reick-McJunkin Dairy Co.*, 281 Pa. St. 543, 127 Atl. 143.

> "Where the public has been accustomed to travel a well defined road across one's land, he is liable to a licensee for personal injuries occasioned by a wire or rope stretched across the road if he has given no warning of the changed condition. *Morrow* v. *Sweeney,* 10 Ind. App. 626, 38 N. E. 187; *Carskaddon* v. *Mills,* 5 Ind. App. 22, 31 N. E. 559; *Nashville, C. & St. L. Ry.* v. *Blackwell,* 201 Ala. 657, 79 So. 129; *Holliday* v. *Hewitt,* 15 N. S. W. St. Rept. 257, 8 British Ruling Cas. 573."

An opinion of the Appellate Court is binding authority not only upon said court, but on all inferior courts in the State of Illinois. *Hughes* v. *Medendorf,* 294 Ill. App. 424.

These decisions were cited before the Circuit Court of Appeals but they were dismissed by that Court with these words: "In the situation here appearing, we do not believe the defendant could have been expected to anticipate the plaintiff's presence on the tracks between the cars." (Tr. 86.) As we said before, this is in view of the former statement in the opinion which said: "It is undisputed that for at least 6 months prior to the accident, persons passed both ways through the property of the Allied Mills and over the defendant's rails." (Tr. 83.)

The District Court in directing a verdict usurped the province of the jury. There was evidence from which the jury might rightfully have concluded that the petitioner was a licensee upon the respondent's premises; that the respondent moved the freight car with such a reckless disregard of the person of others as to amount to a wanton act, and there was evidence from which the jury might reasonably have found that the respondent was guilty of active negligence which resulted in petitioner's injury.

In the case of *Bailey* v. *Central Vermont Railroad Co.,*

319 U. S. 350, 87 L. Ed. 1444, the Court in discussing what should be submitted to a jury said:

> "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence."

Conclusion.

It must be apparent that the lower courts have failed to apply to the admitted facts the established law of the State of Illinois.

We pray the Court to permit an appeal and to reverse the judgment of the Circuit Court of Appeals.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Petitioner.

33

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JAMES R. HILL, A MINOR, BY THEODORE A. HILL, HIS FATHER, AND NEXT FRIEND,
Plaintiff-Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
A CORPORATION,
Defendant-Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Opinion of Circuit Court of Appeals in this case, 153 F. 2d 91	2
Statement as to Federal question	1
Statement of facts	2
Summary of argument	6
Argument	7
Conclusion	21

TABLE OF CASES CITED.

Baltimore & Ohio R. R. Co. v. City of Parkersburg, 268 U. S. 35	7
Baxter, Adm. of Estate of Zeller v. Continental Casualty Co., 284 U. S. 578	7
Blanchard v. Lake Shore & Michigan Southern Ry. Co., 126 Ill. 416	8, 13
Cunningham v. T. St. L. & W. R. R. Co., 260 Ill. 589	8, 13
Erie R. Co. v. Tompkins, 304 U. S. 64	7, 21
Gately v. C. & E. I. R. R. Co., 138 F. (2d) 222	7, 8, 17, 21
Illinois Central R. R. Co. v. Hetherinton, 83 Ill. 510	8, 11, 13
Illinois Central R. R. Co. v. O'Connor, 189 Ill. 559	8
Morgan v. New York Central R. R. Co., 327 Ill. 339	8, 17
Sperry v. Wabash R. Co., 55 Fed. Sup. 825	8, 13
Wabash R. R. Co. v. Jones, 163 Ill. 167	8, 13
Wichita Royalty Co. v. City National Bank, 306 U. S. 103	7, 21

STATUTE CITED.

28 Jud. Code, Sec. 347 (b) (c)	7

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JAMES R. HILL, A MINOR, BY THEODORE A. HILL, HIS FATHER, AND NEXT FRIEND,
Plaintiff-Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
A CORPORATION,
Defendant-Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT AS TO FEDERAL QUESTION.

No federal question was raised or is involved in this case. The accident and injuries involved occurred at Taylorville, Illinois. Petitioner commenced suit in the United States District Court in and for the Northern District of Illinois, Eastern Division. Upon the trial of the case in the District Court the Court directed a verdict for the respondent

and entered judgment thereon (Rec. 66). The petitioner then appealed the case to the United States Circuit Court of Appeals, Seventh Circuit, and that Court affirmed the judgment of the District Court (Rec. 86). The opinion of the Circuit Court of Appeals in affirming said judgment is set forth on pages 81 to 86 inclusive of the record and is reported in 153 Fed. 2nd, page 91. In its opinion in this case the Circuit Court of Appeals stated (Rec. 83), "While this action was brought in the Federal District Court there is no federal question involved other than diversity of citizenship, as a consequence the law of Illinois prevails. Both parties have recognized this by copious citations."

Statement of Facts.

Counsel for petitioner has not either in his petition or brief in support thereof made an adequate statement of the material facts surrounding the occurrence. He has limited his statement largely to what he charged in the complaint and a few meagre references to certain evidence, which does not fairly present the matter involved. The facts are fully stated in the opinion of the Circuit Court of Appeals (Rec. 81 to 86 inc.), but in the opinion no page references are given as to evidence or exhibits, etc. In addition counsel for petitioner has, we think, made certain statements which are not justified by the record. We therefore think it is proper and necessary to include a brief statement of the facts, and we are doing so.

The accident in question occurred on the tracks of the respondent just north of the building of the Allied Mills which is located between North Walnut and Cherokee Streets, in the Village of Taylorville, Illinois. The tracks of the respondent, The Baltimore & Ohio Railroad Company, run in an easterly and westerly direction and pass on the north side of said building. North Walnut and Cherokee Streets are both improved streets, and at the

railroad tracks which cross them there are flasher lights and the usual crossing protection (Rec. 35). To cross the railroad tracks from the north to the south pedestrians can use either Walnut Street or Cherokee Street and cross at a regular crossing (Rec. 24, 35, 50, 55). The only thing to be gained by going through the building of the Allied Mills instead of crossing at a regular protected street crossing on the east or west side of the building would be to save the distance of one-half block (Rec. 50). The premises of Allied Mills is fenced in by a wire fence, referred to by witnesses as a cyclone fence (Rec. 31). This is shown on the photograph (Plff's. Ex. 1, Rec. 13). This fence had been there five or six years (Rec. 31-32).

Petitioner in taking the route he did at the time of the accident, entered the premises of the Allied Mills at the south side, then passed through the building to the north side, crossed a yard inside the fence on the north side of the premises, and then passed out to the north, through an iron or wire gate in the fence on the north side of the premises (Rec. 47). This fence and the gate through it are shown in the photograph (Plff.'s ex. 1, Rec. 13). North of this fence and gate the ground is lower than the ground inside the fence. After passing through the gate there are steps, five in number, leading down to the ground. These steps are shown in the photograph (Plff's. Ex. 3, Rec. 17). They are about eight to ten feet from the track nearest the building (Rec. 20). This gate was locked at 8:00 o'clock in the evening (Rec. 26).

Immediately north of said steps and the tracks was a pile of grain doors or lumber (Rec. 11, 23, 56). This is shown on the photograph (Plff's. Ex. 1, Rec. 13). North of this is a garden (Rec. 23).

Plff's. Ex. 2 (Rec. 15) is a photograph taken with the camera facing east (Rec. 23). It shows the tracks, said grain doors and a view of the north side of said building

of the Allied Mills. In the testimony reference was made to a supposed path. The photograph (Plff's. Ex. 1, Rec. 13) shows the condition of the ground inside the fence approaching said gate. Photograph (Plff's. Ex. 3, Rec. 17) shows the condition leading down said steps and across the ground leading from said steps to the tracks. Plff's. Ex. 2 (Rec. 15) shows the condition of the tracks and adjacent ground looking east past the scene of the accident.

Petitioner testified that he had a newspaper route and that around three or four days a week he would pass through the Allied Mills and onto the railroad tracks; that on the other days he would just go around on Walnut Street and go straight (Rec. 39). The route described above was the route taken by the petitioner at the time of the accident (Rec. 47). He had never gone the other way, i.e., south across the tracks and through the building (Rec. 41). He said that he was going over to some boy's house (Rec. 39) to see if the boy would go with him or to play; that there was no one with him at the time (Rec. 42); that after he passed through the gate he went down the steps, walked north, saw a man doing something with the chains on the conveyor or elevator of the mill, and stopped to watch him (Rec. 42-43); that he stopped and stood between the first two rails between ends of two box cars (Rec. 47) standing on the track and watched the man; that the ends of said cars were about five or six feet apart (Rec. 42); that he stood on the track about twenty seconds (Rec. 53); that his dog, which was with him, barked and he turned half way around (Rec. 45); that the cars moved and the couplings clamped his arm (Rec. 43-45). Petitioner did not see any railroad men working on the tracks prior to the accident (Rec. 43). After the accident some railroad men came up (Rec. 45), but he had not seen any of them before that he knew of (Rec. 45).

As to railroad traffic over the tracks in question the record shows that the respondent did not run very many

trains (Rec. 30, 32); a local train, one way one day and the other way the next day, and maybe switch in the morning and maybe some at night (Rec. 30, 32). The respondent did not have any regular switching crew there (Rec. 32).

With reference to people crossing at the place in question the witness Hanouer (Rec. 19) said maybe three or four boys and several men per day (Rec. 21, 22).

Sellers, who was working at the mill at the time and had worked there for some years prior thereto, said children and all there might be three or four. Some days we don't see it (Rec. 29).

Tackett, who lived north of the mill, said on direct examination that he went through the mill sometimes two or three times a day to go to a creamery located south of the mill, but on cross-examination he said (Rec. 36) he did not walk there two or three times a day; that he knew when he was walking through the mill that he was walking on private property and he knew when crossing the railroad tracks he was on private property (Rec. 36).

Jerry May, petitioner's boy friend whom he testified sometimes accompanied him in delivering papers, testified that sometimes when they went there to go out on a paper route one or two boys would go through when they went through. He further said that if you wanted to cross the tracks you could cross at a regular crossing on Cherokee Street or Walnut (Rec. 55, 56).

Petitioner's father, T. A. Hill, who was a barber and lived and had a shop in Taylorville, said that he was not familiar with the way through the mill, had never gone through it and did not know if it was used by others (Rec. 58).

SUMMARY OF ARGUMENT.

I.

No federal question was raised or is involved in the case. The accident and injuries occurred at Taylorville, Illinois, and in its decision the Circuit Court of Appeals applied the law of Illinois which controls. There is no question presented which gives this Court jurisdiction.

II.

At the time and place of the happening of the accident and injuries in question, petitioner was a trespasser on the track of the respondent, and respondent owed to petitioner no duty other than not to wantonly or wilfully injure him, and there is no evidence tending to show any wantonness or willfulness on the part of the respondent.

The verdict in favor of respondent was properly directed.

III.

There was no evidence that respondent was guilty of any negligence.

IV.

There was no question of fact for the jury.

ARGUMENT.

I.

No federal question was raised or is involved in the case. The accident and injuries occurred at Taylorville, Illinois, and in its decision the Circuit Court of Appeals applied the law of Illinois which controls. There is no question presented which gives this Court jurisdiction.

Baxter, Adm. of the Estate of Zeller v. *Continental Casualty Co.*, 284 U. S. 578.

Baltimore and Ohio R. R. Co. v. *City of Parkersburg*, 268 U. S. 35.

Erie R. Co. v. *Tompkins*, 304 U. S. 64.

Wichita Royalty Co. v. *City National Bank*, 306 U. S. 103.

Gately v. *Chicago & Eastern Ill. R. R. Co.*, 138 F. 2d 222.

28 Jud. Code, Sec. 347 (b) (c).

In *Baxter, Adm. of the Estate of Zeller* v. *Continental Casualty Co.*, 284 U. S. 578, the Court states (p. 580):

> "As the decision of the Circuit Court of Appeals merely applied the law of the state, no question is presented which gives this Court jurisdiction of the appeal."

In *Baltimore & Ohio Railroad Co.* v. *City of Parkersburg*, 268 U. S. 35, the court said, page 36:

> "The decision in both lower courts was rendered on the merits. These we have no occasion to consider. There is no right of appeal to this court, because the jurisdiction of the trial court was invoked solely on the ground of diversity of citizenship."

II.

At the time and place of the happening of the accident and injuries in question, petitioner was a trespasser on the track of the respondent, and respondent owed to petitioner no duty other than not to wantonly or wilfully injure him, and there is no evidence tending to show any wantonness or willfulness on the part of the respondent.

The verdict in favor of the respondent was properly directed.

Illinois Central R. R. Co. v. *O'Connor,* 189 Ill. 559.

Cunningham v. *T. St. L. & W. R. R. Co.,* 260 Ill. 589.

Wabash R. R. Co. v. *Jones,* 163 Ill. 167.

Illinois Central R. R. Co. v. *Hetherinton,* 83 Ill. 510.

Blanchard v. *Lake Shore & Michigan Southern Ry. Co.,* 126 Ill. 416.

Sperry v. *Wabash R. R. Co.,* 55 F. Supp. 825.

Morgan v. *New York Central R. R. Co.,* 327 Ill. 339.

Gately v. *Chicago & Eastern Ill. R. R. Co.,* 138 Fed. 2d 222.

As the record in this case shows, petitioner was injured while he was actually standing on the track of the respondent railroad company. He was not there on or in connection with any business of the respondent but had gone there for his own purposes or pleasure, and was at the immediate time of the accident standing between the rails watching a man who was working on a nearby building. The only reason he gave for this was that he was on his way to see a boy who lived north of the Allied Mills and that he could save a half block's distance by going

through the mill which was between Walnut and Cherokee Streets instead of using Cherokee or Walnut Streets where the railroad crossings were protected by flasher lights and the usual crossing protection. His only reason for stopping and standing between the rails between the ends of some cars standing on the track was to watch a man working on the elevator of the Allied Mills. There can, we submit, be no question but that he was at the time in question a trespasser upon the tracks of the respondent company, and that the respondent owed to him no other duty than to refrain from wilfully and wantonly injuring him.

There were no railroad men around at the time. There is no evidence to the effect and it is not claimed that any railroad men saw or had knowledge of the fact that petitioner was on or around the tracks. To get where he was petitioner had to and did follow a devious route. He first had to enter the building of the Allied Mills at the south side of the building, then pass through the building to the north side, then cross an open space inside the premises until he reached a wire fence on the north side of the premises, then through a gate in said fence and down five steps to the ground outside, then eight or ten feet on to the north until he came to the first track. Said steps, which had been put there so that employees of the Allied Mills could get out to the loading platform, are shown in the photograph at Rec. 17 and were, we submit, clearly not designed or intended for public use. The said gate was locked at eight o'clock in the evening so that after that no one at all could pass through until morning.

At various times in his brief counsel has referred to and contended that there was a well established pathway leading along this route taken by the petitioner. This is not the case. Plff's. Ex. 1 (Rec. 13) shows the gate through which he passed. This photograph is one taken as you

look at it from the south to the north. There is, we submit, absolutely nothing there which shows or indicates a path. Just before you enter the gate the ground looks a little smoother than it does a little further away. Obviously that is where the men going in and out of the gate to the loading platform tramped it down a bit, but there is nothing that can be called a pathway.

Plff's. Ex. 3 (Rec. 17) shows the steps petitioner went down and the ground he crossed in going to the tracks. This photograph is clear and distinct. It shows no path thereon. There is not the slightest indication of a path. The ground does not look as if it had ever been used to walk on. On the contrary, it is cluttered over with paper, refuse and debris.

There is also nothing to show any well defined path, or path of any kind, such as petitioner's counsel talks about after you get out to the tracks. Plff's. Ex. 2 (Rec. 14) shows the condition of the tracks as you look in an easterly direction from a point west of the elevator. It shows nothing but ordinary railroad tracks and ground. Nothing in the way of any path other than such as might be caused by railroad men working alongside of cars. Certainly nothing to indicate any path which held out any invitation or inducement to the public.

The record, we submit, wholly fails to show any common or general public use of the place as a passageway; not only that but there is not a bit of evidence tending to show that respondent knew of or acquiesced in any such use. There was very little railroad traffic over the tracks in question, just a local train one way one day and one train the other way the next day and maybe some switching in the morning and some at night (Tr. 30). There is no evidence to the effect that the Railroad Company knew or had its attention called to the fact that anyone crossed the track at the place in question and there was no reason for it to

suspect or anticipate that anyone might so use it. This particularly in view of the fact that one-half a block east and one-half a block west there were regularly protected crossings over which people could pass. However, had there been some such use, as testified about, and had it been acquiesced in by the respondent it would not change the situation or create any liability on the part of the respondent. There is not the slightest evidence tending to show willful or wanton conduct. A leading case, and one directly in point as to the questions here involved, is *Illinois Central Railroad Company* v. *O'Connor*, 189 Ill. 559. The accident in that case occurred on the tracks of the Illinois Central Railroad Company at the foot of Twenty-fifth Street, in the City of Chicago, Illinois. It was charged in the declaration that the evidence showed that during warm weather numerous people were in the habit, and had been for a number of years, of crossing defendant's tracks at the foot of Twenty-fifth Street and going due east to the lake for the purpose of bathing, fishing, etc. This fact was known to the defendant and its employees operating the train at the time of the accident. On the evening in question, plaintiff, with other boys, went to the lake shore, crossing said tracks of the Illinois Central at the foot of Twenty-fifth Street. He attempted to return by the same route about nine o'clock at night, and when crossing the tracks of the defendant was struck by a flat car which was being backed northward. There was a verdict and judgment in favor of plaintiff which was affirmed by the Illinois Appellate Court. In reversing said judgment the Supreme Court, after pointing out that there was no controversy as to the fact that people were in the habit and had been for several years of crossing defendant's tracks at the place in question for the purpose of going to the lake to bathe, fish, etc., and that such fact was known to the defendant and its employees, stated after quoting from Elliott on Railroads and citing numerous cases, at (p. 564):

"This court is committed to the doctrine that a railroad company, in the operation of its trains, owes no duty to a trespasser upon its right of way or tracks except that it will not wantonly or willfully inflict injury upon him, and we have frequently held that the mere fact that signals required by statutes and ordinances are not given, even though those operating its trains may have knowledge of the fact that persons have been in the habit of crossing its tracks or walking upon them at places other than public crossings or public places, will not amount to proof of willful and wanton disregard of duty toward such trespassers. We said in Illinois Central Railroad Co. v. Godfrey, 71 Ill. 500 (on p. 506): 'The right of way was the exclusive property of the company, upon which no unauthorized person had a right to be for any purpose. The plaintiff was traveling upon defendant's right of way, not for any purpose of business connected with the railroad, but for his own mere convenience, as a footway, in reaching his home on return from a search after his cow. There was nothing to exempt him from the character of a wrongdoer and trespasser in so doing further than the supposed implied assent of the company, arising from their non-interference with a previous like practice by individuals. But because the company did not see fit to enforce its rights and keep people off its premises no right of way over its ground was thereby acquired. It was not bound to protect or provide safeguards for persons so using its grounds for their own convenience. The place was one of danger, and such persons went there at their own risk, and enjoyed the supposed implied license subject to its attendant perils. At the most, there was here no more than a mere passive acquiescence in this use.' " (Italics ours.)

It is to be noted in the *O'Connor* case at page 567 the court calls attention to the fact that the plaintiff could have, by walking a few blocks either to the north or south, crossed the tracks with safety. In the present case all he had to do was to go one-half block either north or south and he could have crossed at a regular protected crossing.

In the *O'Connor* case, *supra*, 189 Ill. 559, the defendant Railroad Company knew of the fact that many people were in the habit of crossing at the place in question. In the case at bar there was no proof of knowledge on the part of the respondent. However, in the *O'Connor* case the court held that the mere knowledge of such a use or practice did not alter the situation. It is there stated (p. 564) as follows:

> "* * * even though those operating its trains may have knowledge of the fact that persons have been in the habit of crossing its tracks or walking upon them at places other than public crossings or public places, will not amount to proof of willful and wanton disregard of duty toward such trespassers."

Directly in point both in fact and in law are *Cunningham* v. *T. St. L. & W. R. R. Co.*, 260 Ill. 589, *Wabash R. R. Co.* v. *Jones*, 163 Ill. 167, *Illinois Central R. R. Co.* v. *Hetherington*, 83 Ill. 510, *Blanchard* v. *Lake Shore & Michigan Southern Ry. Co.*, 126 Ill. 416, and *Sperry* v. *Wabash R. Co.*, 55 Fed. Sup. 825 (decided in 1944).

We here call attention to the fact that the cases of *Chicago & Alton R. R. Co.* v. *O'Neil*, 172 Ill. 57, *Pittsburgh, Ft. Wayne and Chicago Railway Co.* v. *Callaghan*, 157 Ill. 406, and *C. B. & Q. R. R. Co.* v. *Murowski*, 179 Ill. 77, cited by counsel for petitioner on page 9 of his brief herein are not at all in point. They were cited by plaintiffs in the cases of *Illinois Central R. R. Co.* v. *O'Connor*, 189 Ill. 559, and *Cunningham* v. *T. St. L. & W. R. R. Co.*, 260 Ill. 589, *supra*, and there held not to be in point under facts similar to those in the case at bar.

Likewise we submit none of the cases city by counsel for petitioner are in point. On page 8 of his brief counsel for petitioner cites and seems to rely upon:

Bernier v. *Illinois Central Railroad Co.*, 296 Ill. 464. That case, we submit, is not at all in point as to the case at bar. It arose under a wholly different state of facts.

The accident happened at Kankakee, a city of approximately 17,000 population. The right of way of the railroad divides it into two parts. One-fifth of the population lives on the west side. The station occupies a full block between East Avenue on the east side and West Avenue on the west side. The track nearest the passenger station is the northbound main, the track immediately west is the southbound main, and west of that are four switch tracks. There are various platforms used for passengers. There is a cinder path leading from the depot to the west side of the right of way which had been placed there by employees for their own convenience, said path had been there for ten years. A great many people going from one side of the city, or going to the depot, were in the habit of crossing the tracks at the place in question.

The foregoing is a very brief description of the situation. It is described in full at page 467 of said opinion.

The deceased, who lived at Clifton, Illinois, and her parents had gone to Kankakee the day of the accident to visit a relative at the hospital. Upon leaving the hospital they approached the depot from the west. They were planning to get their tickets and then go to a movie show before taking the train home. Deceased and her mother started across the tracks toward the passenger station on said cinder path. There was a long freight train going north on the northbound track and they stood waiting for the freight to pass. The limited train from Chicago was approaching from the north on the southbound track. The freight train was making much noise. The two women were struck by the southbound train. The engineer of the southbound train which struck them said he saw the women approaching the southbound main track from the west and saw them pass over the east rail of said track; that he assumed they knew his train was approaching and that they expected to step into the zone of safety between the passing trains. He gave them no warning, but looked at

the signal board for orders and when he was about 75 feet north of the women he saw they were standing too near the east rail for him to clear them. He then sounded the alarm whistle but it was too late. The defendant was charged with willful and wanton conduct. The court, in holding that the question of whether there was willful and wanton conduct on the part of the defendant was one of fact for the jury, stated as follows (p. 471):

> "Here the engineer admits that when he was less than a block from these women he saw them walking directly in front of a heavy and fast-moving passenger train. He gave them no warning and made no effort to stop his train. When they were on the east rail of his track, scarcely more than a hundred feet from him, he failed to give them warning, but, raising his eyes from them, allowed his engine to move on toward them, not knowing whether they realized their danger and not taking into account that they might become panic stricken when they found themselves between two passing trains. Six feet between two passing trains is a rather narrow space to be designated as a zone of safety. It is common knowledge that more or less suction is created by a moving train."

As will be seen, what the court did was simply to hold that the question as to whether the defendant had been guilty of willfulness was one of fact for the jury under the facts in that case. There is, we submit, not the slightest similarity between this case and the case at bar.

The next case cited by counsel for petitioner is *C. B. & Q. v. Murowski*, 179 Ill. 77, p. 9 of his brief. It is not in point. In that case the tracks of the defendant, which were for the purpose of collecting and hauling freight, were adjacent to the plant of McCormick Reaper Works. A switch led from there into the Reaper Works. The spaces between the tracks at the place in question were and had been planked for ten or eleven years. The entrance of the Reaper Works was over the defendant's tracks. At least

1800 people crossed the tracks every morning and many others in search of employment were accustomed to collect on the tracks in front of the gate each morning and remain for several hours. The plaintiff had gone to the plant for the purpose of seeking employment and was struck by a passing train and engine. It was not claimed that the employees had no right to pass daily over the property nor was it claimed that others seeking employment had no right to be and remain on the tracks opposite the entrance. The court said (p. 82):

> "Under the facts as they appeared from the evidence it was a question for the jury to determine whether plaintiff was a trespasser or whether he was rightfully on defendant's property at the time he was injured."

Very similar are the cases of *Chicago and Alton R. R. Co.* v. *O'Neil*, 172 Ill. 527, and *Pittsburgh, Fort Wayne & Chicago Ry. Co.* v. *Callaghan*, 157 Ill. 406, cited by counsel for petitioner on page 9 of his brief. They are not applicable.

Bremer v. *L. E. & W. R. R. Co.*, 318 Ill. 11, cited by counsel for petitioner on page 10 of his brief, is another case not in point. In that case the deceased was riding on the caboose of the train. He was not on the tracks or crossing the railroad right of way. The train on which he was riding had a head on collision. There was apparently no question but that the train was operated in a reckless and willful manner. It was being operated in the night time, through a heavy fog, at a high rate of speed and in disregard of signals. With reference to the matter of whether or not the plaintiff was a trespasser, etc., the court simply held that that did not matter so long as the defendant had been guilty of willful and wanton conduct.

The verdict in favor of respondent was properly directed.

The undisputed evidence taken in the light most favorable to the petitioner does not in the slightest tend to show any willful or wanton conduct. In such case the respondent was entitled to a directed verdict.

The question of whether an injury has been willfully or wantonly inflicted is no different than any other case. The correct rule is laid down in *Morgan* v. *New York Central R. R. Co.*, 327 Ill., p. 339. There the court stated (p. 346) as follows:

> "While the question of willful or wanton conduct is usually a question of fact for the jury, yet where all the evidence, viewed in its most favorable light for the plaintiff, does not tend to show a willful and wanton act done without regard to the safety of others, the jury should be directed to find a verdict for the defendant. Such is the case here."

See also: *Gately* v. *C. & E. I. R. R. Co.*, 138 (Fed. 2) 22.

III.

There was no evidence that respondent was guilty of any negligence whatsoever.

On page 13 of his brief counsel for the petitioner makes the contention that the respondent was guilty of what he termed active negligence, and even though the respondent was not guilty of willfullness and wantonness, it might be held liable. There is, we submit, no force or merit to this contention and the cases cited by counsel have no application under the facts disclosed by the record is this case. As we have pointed out in the preceding section, petitioner was a trespasser upon the track of the respondent at the time of the accident, and under the well established law of Illinois, the respondent owed to him no other

duty than to refrain from willfully and wantonly injuring him. There is in the record no evidence whatever of any willful and wanton conduct on the part of the respondent. As a matter of fact, there is no evidence tending to show that the respondent was guilty of any negligence whatsoever. The petitioner had gone on to and was actually standing between the rails of the railroad track at the time he was injured. There is no evidence to show and it is not claimed that the railroad employees knew of the presence of the boy on the said track. As a matter of fact there is no evidence that the railroad company or its employees knew that outsiders ever made a practice of crossing the tracks at the place in question. And there was certainly no evidence showing any condition under which the railroad employees should have anticipated petitioner's presence on the tracks at said place. The testimony as to the number of people who had made use of said supposed passageway is so slight as to be wholly negligible so far as showing any common or public use.

In his brief counsel talks about the pathway. As we pointed out in the preceding section the petitioner introduced in evidence various photographs which the witnesses said clearly showed conditions. There is absolutely nothing that shows anything like a path. On the contrary those pictures, if they show anything, show that the route which petitioner took on the occasion was an awkward and devious route. Plaintiff's Ex. 3, Rec. 17, shows that he went down rickety looking steps and then across a strip of ground to the tracks. Said strip of ground does not look as though it had been used at all by pedestrians. It shows no path, is cluttered all over with paper and debris. It is rough and there is not the slightest indication of its having been tramped on.

The facts, as shown in *McDaniels* v. *Terminal Railroad Assn.*, 302 Ill. App. 332, upon which petitioner relies (page

14 of his brief), are entirely different from those shown in the case at bar. As pointed out by the court on p. 345 in the *McDaniels* case the plaintiff was not on any track but was on a well-worn and much traveled pathway along the Wabash railroad right of way over which the defendant company maintained a viaduct pursuant to contract. The facts showed that at the time of the accident employees of the defendant were doing repair work on the viaduct; that there was a well-worn pathway which passed under the viaduct on the east side of the Wabash tracks. Said pathway had been there and in daily use by the public for as many as twenty years. School children regularly used said pathway which constituted a short-cut between certain populous centers. The defendant was familiar with and knew all about this pathway under the viaduct. One of the employees who was working on the viaduct at the time of the accident and who participated in throwing or dropping the girder which struck plaintiff, said that he knew of the pathway, had seen many people walking up and down the pathway before the day on which plaintiff was injured. Defendant's employees were watching for and expecting that people might be walking on the pathway at the time. They said that they rested the heavy timber or girder on the railing preparatory to pushing it off, looked down and shouted a warning. This presents an entirely different situation than is presented in the case at bar. Likewise, *Ryan* v. *C. & N. W. Ry. Co.*, 315 Ill. App. 65, and *Moore* v. *Ohio Oil Co.*, 241 Ill. App. 388, also cited by petitioner's counsel (page 15 of his brief) are not applicable on the facts in the present case.

In the *Ryan* case, 315 Ill. App. 65, the plaintiff, who was a police officer, was at the time of his injury on the premises of the defendant in the course of his duties, he having apprehended a prisoner whom he had detected in the commission of a crime on defendant's right-of-way. The court held, page 77, that decedent was "neither trespasser nor

mere licensee but was rightfully on defendant's right-of-way, when injured, upon business which required his presence there, and that defendant was obligated to the use of reasonable care not to injure him."

In the *Moore* case, 241 Ill. App. 388, it appeared that the defendant was possessed of a farm on which he maintained a house for the use of his employees and a roadway leading from the highway to said house, which said roadway had been used for a long period of time by persons going to and from said house. The defendant without notice stretched a wire across said roadway, causing the accident in question. In other words, the defendant created a trap.

The last case cited by counsel for petitioner, p. 16 of his brief, is *Bailey* v. *Central Vermont Railroad Co.*, 319 U. S. 350. That case is not in point. It is a case which arose under the Federal Employers' Liability Act. There the deceased, a section hand, had been put to work helping to unload a car, and it is claimed that he was unfamiliar with the work and tools he had to use and that defendant was negligent in not furnishing him a safe place to work. It thus appears that it is in no way similar to the case at bar and is not in any sense in point.

We call the court's attention to certain statements made by the petitioner which we think are not in accord with the record. On page 8 of his brief counsel stated "The trial judge failed to state his reasons for directing a verdict." This statement is certainly unjustified for at the time the trial court directed the verdict he specifically stated, in part, as follows (Rec. 81): "My duty under the law requires me to say that a case is not made out against the defendant on the evidence that plaintiff has adduced. I feel that the Illinois law on the subject is very clear and I am required to follow it." The court also stated (Rec. 62): "It is my opinion under the law that he does not have a case against the railroad. Motion of defendant is

granted." At the time this occurred there was considerable discussion or colloquy between the court and petitioner's counsel, and the court clearly stated its reasons for granting the motion (Rec. 61, 62).

CONCLUSION.

It is submitted that under the facts in question, concerning which there is no material dispute, petitioner wholly failed to make out a case for the jury, and under the law of Illinois, which is thoroughly established and clear, respondent was entitled to a directed verdict in its favor.

Erie R. Co. v. *Tompkins,* 304 U. S. 64.
Wichita Royalty Co. v. *City National Bank,* 306 U. S. 103.
Gately v. *Chicago & Eastern Ill. R. Co.,* 138 Fed. (2) 222.

We, therefore, respectfully ask that the petition for writ of certiorari be denied.

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